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No. 00-1606

In The
Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of JESSE CHANDLER,

Petitioners,

vs.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Rather than following *Santa Fe's* proscription of prayers at "government sponsored, school-related events" that involve "both perceived and actual endorsement of religion" and that put "school-age children who object in an untenable position," *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301, 305 (2000), the Eleventh Circuit allows exactly such prayer.

Petitioners acknowledge that minor plaintiff Jesse Chandler graduated May 23, but they vigorously dispute Respondents' contention that his graduation renders this matter unjusticiable. This Court has not allowed mootness to be invoked to preserve an unjust ruling or one with untenable legal consequences. This Court should grant the writ and vacate the Eleventh Circuit's decisions.[1]

I. THIS CASE IS JUSTICIABLE DESPITE JESSE CHANDLER'S GRADUATION.

28 U.S.C. § 2106 provides that this Court may "vacate, set aside or reverse" any judgment, direct entry of judgment, or require further proceedings "as may be just under the circumstances." Where the petitioner has not brought mootness on himself, this Court may exercise its supervisory powers, including "commonly utilized"

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[1] Respondents' appeal is limited to selected portions of the injunction and is not addressed to the district court's other rulings. (Resp. Br. at 4.) These nonappealed rulings are not subject to vacatur, as Respondents acknowledge. (Resp. Br. at 23 n.8.) Respondents acknowledge that they did not challenge the ruling that the student-initiated prayer statute was unconstitutional. (Resp. Br. at 4.) Nor did they challenge any factual findings of the district court. (Opening Br. in 11th Cir. at 4.)

vacatur orders, "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40, 41 (1950). *Accord Sibron v. N.Y.*, 392 U.S. 40, 58-59 (1968) (Court will vacate appellate decisions despite intervening mootness due to its "obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to ... the Constitution") (citations omitted).[2]

Despite intervening mootness, this Court will "make such disposition of the whole case as justice may require." *Walling v. Reuter*, 321 U.S. 671, 677-78 (1944). Whether the Court exercises its supervisory power to vacate all proceedings or none, it must choose the course "most consonant to justice." *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 476, 477-78 (1916).

While Respondents correctly suggest that this Court will not entertain exceptions to mootness for parties who slumber on their rights, *see Munsingwear*, 340 U.S. at 41, they are incorrect in suggesting that Petitioners did so. This Court does not censure parties for attempting to persuade their circuit courts to correct their own errors before

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[2] *See also McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 463 (6th Cir. 1997) (declining to find mootness despite plaintiff's graduation where that would "give the green light" to school districts to violate rules and thereby create "a highly unfavorable precedent"); *Boise City Irrig. & Land Co. v. Clark*, 131 F. 415 (9th Cir. 1904) (taking jurisdiction despite intervening mootness to assure correct application of law).

bringing them here–quite the contrary. *See Wisniewski v. U.S.*, 333 U.S. 901, 902 (1957) (*per curiam*). As the dissent from the denial of *rehearing en banc* underscores, plaintiffs had every right to expect that the full Circuit would correctly apply *Santa Fe* following remand, even if the panel would not. (*See* Corrected Order of April 13, 2001 denying *reh'g en banc*) (Barkett, J., dissenting).) On April 19, 2001, three days after receiving the order denying rehearing, counsel sent the petition to the printer for filing. This is not slumbering on one's rights.[3]

II. RESPONDENTS' THEORIES OF STANDING ARE INCORRECT.

Respondents' argument that Jesse Chandler's relief is limited to his home school, Fyffe, was presented to the Court of Appeals, which found it unworthy of attention. Still, Respondents claim this case is a factual morass when

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[3] Respondents' reliance on *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) is misplaced. There, the plaintiff voluntarily quit the job that was her sole exposure to the constitutional injury. Jesse Chandler graduated; he did not "take voluntary action [that] moots the dispute," conceal mootness from the Court, and then hope to preserve a judgment in his favor, as in *Arizonans*. *See* 520 U.S. at 75. Respondents are correct, however, that if this Court vacates any part of the injunction for mootness, *Arizonans* "vacatur down the line" directive means that all decisions of the Eleventh Circuit must be vacated as well. (*See* Resp. Br. at 23 n.8.) *See also Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir.), *cert. granted, vacated as moot, Joint Sch. Dist. 241 v. Harris*, 515 U.S. 1154 (1995).

no fact – as to standing or otherwise – was ever in doubt.[4] *See supra* note 1 (facts conceded).

Respondents overlook that the plaintiffs in *Lee v. Weisman* obtained an injunction against the whole school system, although not every single school offered prayers. *See Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990). Moreover, Jesse should not be penalized for the fact that prayers were so "pervasive and recurrent" (App. E12) that they also occurred at schools besides Fyffe. Perversely, this result is precisely what Respondents' theory entails. (*See* Resp. Br. at 13.)

This aside, Respondents simply mischaracterize the facts. Jesse *personally experienced* every category of school-sponsored prayer and devotional activity the injunction proscribes: prayer at Fyffe graduation, prayer over the intercom at football games, including at Fyffe, prayer in Fyffe classrooms, and prayer, devotionals or Bible readings using the P.A. system in classrooms or school assemblies at Fyffe. (R1-4; App. E21, E32, E37, E64-6, E67-70. *See also* R-1-1, ¶¶ 21, 26-27, 19-33, 34-37, 39). Jesse secured no more than he had standing to seek.

III. THIS CASE IS GOVERNED BY *SANTA FE*, WHICH WAS DISREGARDED.

In Respondents' quest to make this simple case

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[4] If Jesse is mooted by graduation, Respondents' overly constricted view of the standing necessary to secure relief from a systemwide policy is no reason, as they urge, to deny the writ–for findings on standing in the district court or elsewhere would in such event be superfluous.

appear factually complex and thereby deflect *certiorari*, they mischaracterize the record and the injunction. While conceding on appeal all factual findings of the district court, they now claim that the trial court "disregarded factual particulars." (Resp. Br. at 20.) It is in fact the Respondents and the Eleventh Circuit that ignore the facts, facts that establish "school-sponsored," not "private," prayer and facts that fall within *Santa Fe's* proscriptions, which the appellate court should have, but did not, note.

The school board *stipulated* that graduation exercises are "school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (E45-46, E50.) Moreover, "[t]he graduation services held in each of DeKalb County's eight high schools regularly incorporate religious invocations and/or benedictions," which has meant prayers ending "in Jesus' name." (App. E48-49; E25-26.) These facts were ignored.

Likewise, since 1985, prayer over the P.A. system at football games, characterized by the superintendent as a "tradition," was sponsored. The school board *stipulated* to its control over home football games, access to the P.A. system, the ultimate supervision of high school principals, and that high school football games and other athletic events do occur on school property. (App. E31, E45.)

Respondents, like the Eleventh Circuit, fail to recount the frank truth that special prayer time is set aside by DeKalb *school officials*, even though students speak the prayers. Prayer, and no other speech, is privileged. School officials control the format of the ceremony and provide for "invocations" and "benedictions," as graduation

programs reflect.[5] Curtailing school officials from inserting prayer into graduations, football games, classrooms or assemblies is not discrimination against "genuinely student-initiated prayer" or religious references. (Resp. Br. at 9.) *Santa Fe* and the district court recognized this difference. (*But see* App. A7, B24.)

The district court understood, in graduation and all other contexts, that some prayer and religious expression *is* private–and took great pains to reach only "*school-organized*" or "*officially sanctioned religious activity.*" (App. F) (emphasis in injunction). *See also* dissent from denial of *reh'g en banc*.) It proscribed only prayer using the machinery of the state, such as the P.A. system, at school-sponsored assemblies and events. (App. F.)

Yet the Eleventh Circuit, on remand, continued to insist that prayer of the sort here and in *Santa Fe*–prayer "delivered to a large audience assembled as a part of a regularly scheduled, school-sponsored function conducted on school property"or "broadcast over the school's public-address system, which remains subject to the control of school officials"–is "private" prayer.[6] *Compare* 530 U.S.

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[5] *See, e.g.*, App. E49. The district court was aware that valedictory and other speeches proceed independently of the invocations and benedictions. It found that proscriptions on such school-sponsored prayer do not affect "a valedictorian's expressive right to make a brief reference to Deity in a valediction." (App. E54). Its injunction says the same. (App. F6-7 & n.1.) This is not antireligious discrimination.

[6] *Santa Fe* explicitly rejected the argument, embraced by the Eleventh Circuit, that school officials' permitting other speech

at 300-01, 307-09 *with* A5-6. There is no principled way to avoid the fact that the prayers in DeKalb County have borne the imprint of the state as surely as the prayers in *Santa Fe* did: they were recited using school facilities and microphones, delivered to school audiences, at school events. The Eleventh Circuit acknowledges that these were the indicia of school-sponsored prayer in *Santa Fe*,[7] but could not see those same indicia of sponsorship in *Chandler*. It could not see or it ignored both the facts and the difference between an Establishment Clause violation and "viewpoint discrimination" and censorship. (*See* A8.) Its blindness is serious--it has ignored the very text of an injunction that explicitly protects truly private religious speech, in just the manner that *Santa Fe* does.[8]

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besides prayer meant that permitting prayer was merely a "neutral accommodation of non-coerced, private, religious speech." (App. B.) Contrary to Respondents' misrepresentation, *see* Resp. Br. at 16, *Santa Fe* did anything *but* apply *Mergens* to a case about praying over the P.A. system at school-sponsored events. What the Court actually said, in rejecting *Mergens* in the school-sponsored prayer context, is: "[W]e are not persuaded that the pregame invocations should be regarded as 'private speech.'" *Santa Fe*, 530 U.S. at 302. Yet *Mergens* dominates the Eleventh Circuit's rulings.

[7] "What the court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer." *See* A7. Petitioners agree, as would the district court.

[8] *Compare* App. D (sections beginning "THIS PERMANENT INJUNCTION DOES NOT") *with Chandler II's* characterization of injunction ("It eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors."). The Eleventh Circuit can reach

The Eleventh Circuit ignores the facts that undergird the injunction and refuses to read it in its entirety, plucking language out of context and severing remedial provisions from the facts that are their genesis. Contrary to the Eleventh Circuit, the injunction does not *censor* permissible speech or "impose discriminatory restrictions on private religious speech" any more than *Santa Fe* does. (App. A8; Resp. Br. at 15.)[9]

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this conclusion only because it believes, contrary to *Santa Fe*, that prayers delivered over the P.A. system to captive students are somehow private because no school official delivers them. This Court has ruled otherwise.

[9] It is ironic that Respondents, who purport to champion students' speech rights, here falsely deride the injunction's express protections of these rights as "exceptions to exceptions." (Resp. Br. at 2.) The injunction is straightforward. It excepts from its reach all Equal Access Act rights; the appropriate use of religious texts in the classroom; students' voluntary expression of religious belief in homework and other assignments; the display of religious symbols and wearing of religious clothing or jewelry; student distribution of religious materials; the rights of students to persuade their peers on religious topics; and the announcement of noncurricular religious club meetings. (App. F.) Under the injunction, Sally Jones may in fact sing "Amazing Grace" at a talent show, based on the protection for expression of her religious beliefs in assignments, contrary to Respondents' speculation. (*See* Resp. Br. at 17.) This is not the first time Respondents have substituted rhetoric for a reasonable reading. Indeed, the district court thoughtfully rejected every similarly tortured hypothetical that Respondents presented when they asked it to stay its injunction. (App. D.) The district court in that ruling did not pronounce its injunction "insufficiently tailored"; it stayed exactly 12 words of its 3,714 word injunction. (*Compare* App. D3, D47, n.26 *with* Resp. Br. at 14.)

Rather, the injunction, like *Santa Fe*, defines a sphere for private student speech which school officials may not transgress and a sphere of school-sponsored prayer that, because of the setting and audience, conveys a message of official endorsement and coerces listeners. The Eleventh Circuit's opinions are exactly contrary to *Santa Fe*, and no amount of argument or apologia can change this fact.

It is an injustice to the Chandlers and a violence to the law to misread an injunction that bends over backwards to preserve student religious rights as one forbidding them "to speak religiously in any sort of public context." (App. A9.) The injunction enjoins, on its face, "school-sponsored" prayer. (App. F.) Any honest application of *Santa Fe* here must recognize this fact.

This Court in *Santa Fe* did not rest its decision on discrete aspects of a majority-vote or putative equal-access policy, the basis on which the Eleventh Circuit on remand found *Santa Fe* distinguishable from this case. (*Compare* App. A3-4 *with* 530 U.S. at 307 ("the actual or perceived endorsement of the message is established by facts beyond just the text of the policy.").)[10]

Because the Eleventh Circuit decision did not distinguish but instead conflated school-sponsored with private prayer and ignored the essence of *Santa Fe's* ruling on both endorsement and coercion, it requires the district

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[10] Here, there is not even a pretense of an equal-access-for-secular-speech policy such as existed in *Santa Fe*–the school board has flat-out inserted the prayers into programs it controls. Any insinuation otherwise derives from imagination.

court on remand to enter an unconstitutional order.[11] No district court can follow the Eleventh Circuit's command without disregarding this Court's school-prayer precedents.

CONCLUSION

The Court has broad supervisory power under § 2106 to resolve a case justly and also to prevent evisceration of its precedents. The Eleventh Circuit decisions must be vacated for all of the reasons stated in the petition and herein.

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[11] It even ignores the distinction between public and other fora, allowing nonstudents to use the state's P.A. system and audience for prayer. (App. B6 at n.6; B22, B25.) No amount of disavowal by Respondents will retract this holding. No amount of argument that the Eleventh Circuit never explicitly *said* schools are public fora will change the fact that it conferred rights on nonstudents to pray over the school's P.A. system at school-sponsored events. No amount of argument will change the fact that no other court has conferred such an extraordinary right in our nation's schools.

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